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ment, decision after decision tends toward further complication as each court reacts to the exigencies of the particular situation as colored by the deep seated opinions each judge seems to have concerning obscenity. All, however, seem to recognize, and the conflicts bear out, that a special problem exists. That problem seems to be that the "definition of obscenity" rests within the mind of the average adult, in his sensibilities and morality, and no one is quite certain how to discover this definition while obeying the commands of our constitutions.

The best manner of discovering the "definition of obscenity" in each case is to go to its source, the average adult. The average adult is a composite being, comprised of six or twelve individual adults—the jury—not a judge.

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EQUITY AWARD OF PUNITIVE DAMAGES—A RARE BUT RECURRABLE INSTANCE

Defendant corporation owned and leased to plaintiff corporation premises located at 210 Central Park South. Under the terms of the lease both parties waived jury trial in any matter connected with the tenant's occupancy. The defendant landlord, finding that income could be increased by destroying the premises and redeveloping the site, notified plaintiff that the corporation was going to terminate the lease; this notice was rejected by the plaintiff. Defendant landlord broke through a strong door of the premises at night, removed all electric fuses and boarded up the windows and entrances. Plaintiff removed these boards and went about his business while the defendant made further plans. Again the defendant lessor entered the locked premises and employed an ironworker to bar the windows and entrances with welded metal bars and plates. The lessee removed these bars, hired armed guards to prevent further intrusion and initiated an action for injunction and received a temporary injunction. At the trial the plaintiff was allowed to amend the complaint to plead that the acts complained of were willful and wanton and to include a prayer for punitive as well as compensatory damages. The trial court awarded a permanent injunction, compensatory damages, and punitive damages of three times the compensatory damages! On appeal it was held that punitive damages may be awarded in addition to injunctive relief, but the court reduced the findings of the amount of compensatory and punitive damages.[1]

Exemplary, punitive or vindictive damages, sometimes called "smart money," are awarded to penalize the defendant as a deterrent or to make an example of him for his willful, wanton or malicious conduct.[2] The action for recovery of such has historically been one at law and the great weight of authority outside New York has denied that a court of equity has power to

1. I.H.P. Corp. v. 210 Central Park South Corp., 27 Misc.2d 964, 212 N.Y.S.2d 136 (Sup. Ct. 1961), *modified*, 16 A.D.2d 461, 228 N.Y.S.2d 883 (1st Dep't 1962).

2. *E.g.*, Walker v. Sheldon, 10 N.Y.2d 401, 179 N.E.2d 497, 223 N.Y.S.2d 488 (1961); Douglas v. Tomkins Realty Corp., 28 Misc. 2d 192, 210 N.Y.S.2d 550 (Sup. Ct. 1960).

make such an award on various grounds.[3] The Appellate Division in the *Central Park South* case directly overruled the most recent New York decision handed down by the same department fifteen years earlier. It was stated that "The Court has no power in an action in equity to award exemplary or punitive damages."[4] The reasons for the rule were not explored in the three previous New York cases[5] and reliance had been placed on two federal cases, one from the ninth circuit[6] and one from the northern district of Illinois.[7] The ninth Circuit said that "the function of a court of equity goes no farther than to award as incidental to other relief, or in lieu thereof, compensatory damages. It has no authority to assess exemplary damages."[8] The court cited for authority an 1855 case from South Carolina which stated without citing authority that "plaintiff by applying to this court, waives all claim to vindictive damages."[9] In the other federal decision[10] which New York cases in the past have relied upon, the court said that equity had no authority to assess punitive damages and used for authority the ninth circuit case. The Appellate Division, commenting that in none of these cases was the rationale for the rule explored,[11] then reasoned that since section 8 of the Civil Practice Act[12] has abolished the distinction between actions at law and suits in equity there can be no reason for such a rule in this state.

The Appellate Division in the opinion by Justice Breitel unquestionably relied on the "merger" of the forms of action in New York as the basis of its decision. This raises interesting questions as to how the court acted in making the "equitable" and "legal" awards in the same action. If the court is making primarily an equitable award of an injunction, and the award of compensatory and punitive damages is "incidental" to the decree, the case is not of great importance except insofar as it states that punitive damages may be awarded

3. *E.g.*, Colburn v. Simms, 2 Hare. 543, 67 Eng. Rep. 224 (1843); Orenstein v. United States 191 F.2d 184 (1st Cir. 1951); Coca-Cola Co. v. Dixi-Cola Laboratories, Inc., 155 F.2d 59 (4th Cir. 1946), *cert. denied*, 329 U.S. 773 (1946); Leimer v. Woods, 196 F.2d 828 (8th Cir. 1952); Williamson v. Chicago Mill & Lumber Corp., 59 F.2d 918 (8th Cir. 1932); Moore v. Carr, 224 Ala. 275, 139 So. 269 (1931); Littlejohn v. Grand International Brotherhood of Locomotive Engineers, 92 Colo. 275, 20 P.2d 311 (1933); Orkin Exterminating Co. v. Truly Nolen, Inc., 117 So. 2d 419 (Fla. Dist. Ct. App. 1960). See also 48 A.L.R.2d 947 and cases cited.

4. Dunkel v. McDonald, 272 App. Div. 267 at 272, 70 N.Y.S.2d 653 at 658 (1st Dep't 1947), *aff'd on other grounds*, 298 N.Y. 586 ,81 N.E.2d 323 (1948).

Accord, Withop & Holmes Co. v. Great A & P Tea Co., 69 Misc. 90, 92, 124 N.Y.Supp. 956, 958 (Sup. Ct. 1910): "The court has no power to impose a fine under the name of exemplary damages in such a case, but is limited to the granting of injunctive relief only." Also, Winthrop Chemical Co. v. Blackman, 159 Misc. 451, 453, 288 N.Y.Supp. 389, 391 (Sup. Ct. 1936): "No action on the part of the defendants, no matter how fraudulent or wrong it may be, can give a court of equity the right to grant such damages."

But see Darr v. Cohen, 94 Misc. 471, 158 N.Y.Supp. 324 (Sup. Ct. 1916).

5. See note 4 *supra.*

6. United States v. Bernard, 202 Fed. 728 (9th Cir. 1913).

7. Taylor v. Ford Motor Co., 2 F.2d 473 (D.C.N.D. Ill. 1924).

8. United States v. Bernard, *supra* note 6, at 732.

9. Bird v. Wilmington & M.R.R., 29 S.C. Eq. (8 Rich.) 46, 57 (1855).

10. United States v. Bernard, *supra* note 6.

11. 16 A.D.2d 461, 463, 228 N.Y.S.2d 883, 884.

12. *Cf.*, N.Y. CPLR § 103, eff. Sept. 1, 1963.

in an equitable cause. However, it is the contention of the writer that the court in making the award of punitive damages made such an award as a court of law, and in this respect the case may have a great effect in asserting the flexibility of New York courts to grant necessary effective relief and also raised questions as to the right to trial by jury on such a legal claim. An examination therefore must be made of the history in New York of the doctrine of merger, and then the language of the Appellate Division must be analyzed to see how it used the doctrine. Finally, we must determine the rights of the respective parties to trial by jury when such "legal" and "equitable" relief is demanded.

The Legislature in 1848 ordained that "The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing are abolished; and there shall be in this state, hereafter, but one form of action, for the enforcement or protection of private rights and the redress or prevention of private wrongs, which shall be denominated a civil action."[13] However, this "merger" did not go uncriticized, and many judges led by Judge Sheldon of the Court of Appeals could not espouse such a liberal view. "By what process can these two modes of relief be made identical? It is possible to abolish one or the other, or both, but it certainly is not possible to abolish the distinction between them."[14] The courts in New York were slow to "abolish" the distinction between the legal and equitable causes of action. Indeed, one could question today whether the distinctions have been abolished.

The early history in New York shows that the courts have generally followed the "one form of action" doctrine although pre-code ideas were sometimes used.[15] The Court of Appeals in 1901 held that an action for ejectment for possession of land was the same cause of action as an equitable proceeding for an injunction to secure the removal of the encroachment, and the two remedies could not be split.[16] Section 479 of the Civil Practice Act provides that where there is an answer to the complaint the plaintiff may take any judgment consistent with the case made by the complaint and embraced within the issues whether demanded or not.[17] This also indicates that the courts are not divided into law and equity branches, each dispensing its own type of relief, but may grant legal and equitable relief together. But the Court of Appeals in the case of *Jackson v. Strong*[18] refused to allow a judgment to stand where

13. N.Y. Laws 1848, C. 379 § 62. *But see* Coca Cola v. Dixi Cola Labs., Inc., 155 F.2d 59 (4th Cir.), *cert. denied*, 329 U.S. 773 (1946).

14. Reubens v. Joel, 13 N.Y. 488, 493 (1856). See also Voorhis v. Childs' Executor, 17 N.Y. 354 (1858).

15. *E.g.*, Gould v. Cayuga Co. Nat. Bank, 86 N.Y. 75 (1881); Bradley v. Aldrich, 40 N.Y. 504 (1869).

16. Hahl v. Sugo, 169 N.Y. 109, 62 N.E. 135 (1901). See also Maflo Holding Corp., v. S. J. Blume, Inc., 308 N.Y. 570, 127 N.E.2d 558 (1955); City of Syracuse v. Hogan, 234 N.Y. 457, 138 N.E. 406 (1923); Barlow v. Scott, 24 N.Y. 40 (1861).

17. *Cf.*, N.Y. CPLR § 3017a (part of last sentence), § 3215b (last sentence). However, where there is no answer the judgment for plaintiff shall not be more favorable than that demanded in complaint. N.Y. Civ. Prac. Act § 479.

18. 222 N.Y. 149, 118 N.E. 512 (1917). See generally Clark, *The Union of Law and Equity*, 25 Columbia Law Rev. 1 (1925).

the trial court granted the plaintiff recovery at law for proven damages although the cause of action was in equity and plaintiff failed to amend the pleadings. The Court stated that "the inherent and fundamental difference between actions at law and suits in equity cannot be ignored."[19] It should be emphasized that the Court said that where there is no proof of equitable jurisdiction in such a case a court will "dismiss the complaint"[20] but the Court did grant a new trial. This was a complete frustration of the purpose of the merger of law and equity, namely to avoid a multiplicity of suits; and it demonstrates the fact that although the Legislature has long ago abolished the distinction, there has been some reluctance to give relief which the party has not expressly requested. *Jackson v. Strong* notwithstanding, the better authority was first announced in 1855. Here the Court held that where a plaintiff asked for equitable relief but at the trial proved only a case for legal relief, the legal relief should be granted.[21]

From the above it is clear that the "merger" doctrine has had less effect than was intended when it was first enacted by the legislature. We now turn to the opinion by Justice Breitel in the *Central Park South* case to determine if the court is making the award of punitive damages at law in using the merger doctrine. The distinction must be kept clear between an award of legal damages in an equitable suit as "incidental" and an award which is "at law" using the terms with these classical meanings. An award of the former type is simply an equity case and the whole award is equitable with all the typical effects. But an award of an injunction and pure legal damages in the same action would carry with it different effects, especially as to the question of the trial by jury, as will be seen later.

There are usually three reasons given for denial of punitive damages in an equitable suit: (1) A court of equity has no such power;[22] (2) Equity will give only what is justly due and will not enforce a penalty;[23] (3) By suing for equitable relief an aggrieved party waives all claims to punitive damages.[24] Justice Breitel said that the first reason usually given is not true because modern courts do not sit exclusively as equity or law courts as they formerly did but can act in both roles at the same time in the same case.[25] He did not say that the equity court has the power to award punitive damages but rather that the court, because of the merger, is empowered to dispense equitable and legal relief in the same action.[26] It should also be noted that neither here nor elsewhere in the opinion did the Judge refer to the award of punitive damages as

19. 222 N.Y. 149, 154, 118 N.E. 512, 513 (1917).
20. *Ibid.* See generally *Erroneous Prayer for Equitable Relief*, 42 Cornell L.Q. 376 (1957).
21. Marquat v. Marquat, 12 N.Y. 336 (1855).
22. *E.g.*, Dunkel v. McDonald, 272 App. Div. 267, 70 N.Y.S.2d 653 (1st Dep't 1947).
23. *E.g.*, Livingston v. Woodworth, 56 U.S. (15 How.) 546 (1853); Superior Construction Co. v. Elmo, 204 Md. 1, 104 A.2d 581 (1954); see also *Punitive Damages in Equity* 16 Md. L. Rev. 68 (1956).
24. *E.g.*, Bird v. Wilmington and M.R.R., *supra* note 9.
25. I.H.P. Corp. v. 210 Central Park South Corp., 16 A.D.2d 461, 464, 228 N.Y.S.2d 883, 886 (1st Dep't 1962).
26. *Id.* at 464, 228 N.Y.S.2d at 887.

one where the equity court is making it as incidental to the injunctive relief. The Judge dismissed the second reason as an "outgrowth of the procedural separation,"[27] that cannot control where there is only one form of action. This reason assumes that a traditional equitable remedy can afford complete relief and to apply it would also bar award in another action since a single cause of action cannot be split.[28] Although the court does not point it out, the fact remains that penalties are enforced by equity courts for violations of injunctions by fine or imprisonment. It would seem therefore that the maxim is of questionable validity in any case. The waiver argument was quickly dismissed by the court because it assumed that the remedies are exclusive, the very issue to be resolved. Justice Breitel also pointed out that a party should not reasonably be required to choose between two inadequate remedies. The language of the court elsewhere indicated that in making the award of punitive damages the court was not acting as a court of equity but "act[ing] in both roles at the same time in the same case."[29] Aside from the reliance by the court on the doctrine of merger the authority cited by the court seems weak. The two leading states which have allowed such awards are Tennessee and California. Punitive damages have been awarded in equity cases where there was direct statutory authority.[30] These cases do not seem to be in point and the cases from Tennessee[31] arise under a procedural system which has not been merged and therefore the rationale given for discarding the three reasons would not apply in that state. The only cases which remain are those from California[32] where the system has been merged.[33] The basic reason then for awarding punitive damages is the merger of the systems in both states.

The Appellate Division also cited the Court of Appeals case of *Walker v. Sheldon*.[34] It was held that punitive damages were recoverable in an action for fraud and deceit where fraud is on the public and there is a high degree of moral culpability. The majority in *Walker v. Sheldon* citing an 1873 case said, "It is not the form of the action that gives the right to the jury but the moral culpability of the defendants."[35] The *form* the Court alluded to in that case referred to fraud or deceit as opposed to traditional tort wrongs as giving rise to punitive damages. The Appellate Division used it to refer to law or equity form. This may be questionable. There was a strong dissent in *Walker*

27. *Ibid.*
28. *Supra* note 16.
29. I.H.P. Corp. v. 210 Central Park South Corp., 16 A.D.2d 461, 464, 228 N.Y.S.2d 883, 886 (1st Dep't 1962).
30. *E.g.*, Sterling Drug., Inc. v. Benatar 99 Cal. App. 2d 393, 221 P.2d 965 (1950); Sandler v. Gordon, 94 Cal. App. 2d 254, 210 P.2d 314 (1949).
31. *E.g.*, Kneeland v. Bruce, 47 Tenn. App. 136, 336 S.W.2d 319 (1960); Bryson v. Bramlett, 204 Tenn. 347, 321 S.W.2d 555 (1958); Lichter v. Fulcher, 22 Tenn. App. 670, 125 S.W.2d 501 (1938).
32. *E.g.*, Rivero v. Thomas, 86 Cal. App. 2d 225, 194 P.2d 533 (1948); Union Oil Co. v. Reconstruction Oil Co., 20 Cal. App. 2d 170, 66 P.2d 1215 (1937).
33. See generally Jarner and Geddes, *Union of Law and Equity*, 55 Mich. L. Rev. 1059, 1111 for list of states which have merged systems.
34. 10 N.Y.2d 401, 179 N.E.2d 497, 223 N.Y.S.2d 488 (1961).
35. Hamilton v. Third Ave. R.R., 53 N.Y. 25, 30 (1873).

v. Sheldon which not only questioned the propriety of granting punitive damages in an action for fraud and deceit, but also questioned the punishment of the defendant in a civil suit. The dissent in *Walker v. Sheldon* thought that this was a function of criminal law and could better be handled by that avenue of the courts than by punitive damages. All this points out the fact that the award of punitive damages in an equitable action may not be looked on with great favor by the highest state court.

The language of the court therefore clearly shows, insofar as it made the award of punitive damages in an action for injunction, that it acted as a court of law. The court further indicated that this is true when it touched upon the right to trial by jury. The parties in the case had contractually waived any right to trial by jury in any matter connected with the tenant's occupancy. The court indicated that the right to trial by jury would be preserved.[36] Both parties have a right to trial by jury on any issue which was triable to a jury prior to 1894.[37] The award of punitive damages is an issue of law and triable to a jury because they are penal in nature and different in purpose from compensatory damages.[38] Whether they are to be awarded is a matter which is in the discretion of the trier of fact; either a jury or the court where a jury has been waived.[39] Where the plaintiff seeks legal and equitable relief in respect to the same wrong he ordinarily waives his right to trial by jury on the legal claim.[40] But the defendant still has a right to trial by jury on the legal claim.[41] Since the court awarded the punitive damages at law, as a court empowered to act in both roles, the defendant unquestionably has a right to trial by jury on the legal claim. But the greater question is aimed at the right of the *plaintiff* to trial by jury. The defendant may be happy to waive his right to trial by jury on the issue of punitive damages because if tried before a jury the plaintiff may introduce evidence to the jury concerning the wealth of the defendant to better enable it to assess an amount which will truly "deter" the defendant from again behaving in the same manner. The court will grant the punitive damages only where the award of the injunction alone "may not be as effective as a punitive damage award, which is designed to deter deliberate and malicious conduct offensive to all."[42] The damages will be awarded only in "a rare but recurrable instance"[43] where the injunction would be inadequate. Because the

36. I.H.P. Corp. v. 210 Central Park South Corp., 16 A.D.2d 461, 464, 228 N.Y.S.2d 883, 886 (1st Dep't 1962).

37. N.Y. Const. art. I, § 2. See Tillotson v. Cheetham, 3 Johns. R. 56, 3 Am. Dec. 459 (Sup. Ct. 1808) award of punitive damages tried by jury.

38. Hamilton v. Third Ave. R.R., 53 N.Y. 25 (1873).

39. Craven v. Bloomingdale, 54 App. Div. 266, 66 N.Y.Supp. 525 (1st Dep't 1900), *rev'd on other grounds*, 171 N.Y. 439, 64 N.E. 169 (1902).

40. *E.g.*, Di Menna v. Cooper and Evans Co., 220 N.Y. 391, 115 N.E. 993 (1917). *But see* Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) for rule in federal courts.

41. *E.g.*, City of Syracuse v. Hogan, 234 N.Y. 457, 138 N.E. 406 (1923). See N.Y. Civ. Prac. Act § 426(5), *cf.* N.Y. CPLR § 4102(a) eff. Sept. 1, 1963.

42. I.H.P. Corp. v. 210 Central Park South Corp., 16 A.D.2d 461, 465, 228 N.Y.S.2d 883, 887 (1st Dep't 1962).

43. *Id.* at 466, 228 N.Y.S.2d at 888.

court in the first instance would have to decide that the injunction alone would be ineffective, the court would be in the best position to determine what amount of punitive damages coupled with the injunction would be adequate. The plaintiff could have no cause for complaint because what he is seeking is an effective remedy. If the plaintiff is simply interested in getting a large amount of punitive damages he should not also ask for the injunction. However, the application of the waiver of the lease in the instant case may be questioned. Punitive damages are awarded for outrageous tortious conduct.[44] The award of punitive damages cannot therefore be based on a contract.[45] The plaintiff in the instant case did not base his claim for punitive damages on the breach of the lease but rather on the torts of the defendant. Since waivers of trial by jury in a lease are to be strictly construed,[46] the waiver in the contract could be considered to be immaterial in regard to the torts of the defendant. However, from the opinion of the court it is impossible to determine whether the defendant asked for trial by jury.

There can be no question that courts in the State of New York were intended to have the power to mold decrees which will be effective and achieve desired ends. A litigant should be able to afford himself an effective remedy with a minimum of litigation. The court in the instant case, faced with a situation which could not be effectively dealt with by a traditional decree, molded its decree to attain the necessary result. In doing this the court has discarded outmoded procedural distinctions in order to give complete relief to the aggrieved party. In doing so it has given new life to the Legislative abolishment of the forms of action which took place over eleven decades ago. Since the court is acting both as a court of law and a court of equity at the same time, it must grant the defendant the right to trial by jury on the issue of punitive damages but the plaintiff waives his right by asking for both types of relief. When the courts are faced with the facts as in the instant case which admittedly constitute "a rare but recurrable instance"[47] any denial of adequate relief would be both an injustice and a throwback to pre-code doctrine, a system which hopefully shall never return.

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44. See 1 Clark, New York Law of Damages § 76 (1925). *But see* Walker v. Sheldon, *supra* note 34.

45. Avery v. Shields, 50 N.Y.S.2d 939 (Sup. Ct. 1944).

46. *E.g.*, Kilpack v. Raymar Novelties, Inc., 273 App. Div. 54, 75 N.Y.S.2d 418 (1st Dep't 1947). See generally 73 A.L.R.2d 1333.

47. I.H.P. Corp. v. 210 Central Park South Corp., 16 A.D.2d 461, 466, 288 N.Y.S.2d 883, 888 (1st Dep't 1962).